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Kerajaan Malaysia v Mudek Sdn Bhd

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPLICATION NO 01(f)-12–05 OF 2016(B)
SURIYADI, ZAINUN ALI, ZAHARAH IBRAHIM, PRASAD ABRAHAM AND JEFFREY TAN FCJJ
2 OCTOBER 2017

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Civil Procedure — Summary judgment — Application for — Appellant filed recovery proceedings for real property gains tax — High Court allowed summary judgment — Court of Appeal by majority judgment set aside High Court order — Whether issue of no chargeable gain could be raised as triable issue — Whether respondent should have filed appeal on the issue of no chargeable gain to special commissioner

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Revenue Law — Real property gains tax — Liability for payment of — Appellant filed recovery proceedings for real property gains tax — High Court allowed summary judgment — Court of Appeal by majority judgment set aside High Court order — Whether issue of no chargeable gain could be raised as triable issue — Whether respondent should have filed appeal on issue of no chargeable gain to special commissioner

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The respondent entered into a sale and purchase agreement with a company known as Yeng Chong Realty Sdn Bhd ('Yeng Chong') wherein the respondent agreed to sell to Yeng Chong a piece of land located in Melaka. Nevertheless, the sale of the said land was not completed, thus, the respondent contended that it could not be said to had disposed of the said land, nor could it be said that a chargeable gain had accrued to the appellant within the meaning of the Real Property Gains Tax Act 1976 ('the Act'). The respondent therefore asserted that it was not liable at all to pay any real property gains tax ('RPGT') under the law. In the present case, the appellant had filed the recovery proceedings for the RPGT in the High Court and subsequently the appellant filed an application for summary judgment pursuant to O 14 of the Rules of the High Court 1980. The High Court had allowed the application but the Court of Appeal by a majority decision set aside the High Court order and set it down for trial. In the majority judgment, the Court of Appeal held that, since there was no chargeable gain, as the consideration sum was not paid, that constituted a triable issue. In the present appeal, the leave questions arose were: (a) whether in hearing and deciding the application for summary judgment in a civil action for the recovery of tax due and payable by the taxpayer under s 23(1) of the Act, the court could entertain the issue of whether there had been

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a chargeable gain accruing and/or disposal of assets between the buyer and the seller prior to the assessment raised against the taxpayer; (b) whether in deciding the appellant's civil claim under s 23(1) of the Act, the issue as to a chargeable gain had accrued and/or disposal of assets raised a triable issue; and (c) which was the right forum to hear and decide regarding the facts on whether there had been a chargeable gain accruing and/or disposal of assets under the assessment raised by the appellant.

Held, setting aside the majority judgment of the Court of Appeal and allowing the appeal with costs:

(1) Pursuant to s 21(1) of the Act, once a notice of assessment has been served, the tax payable will be due and payable. If the respondent felt aggrieved by the issue of no chargeable gain arising, the respondent should have lodged an appeal to the Special Commissioners of Income Tax pursuant to s 18 of the Act. Since no appeal was lodged, this issue was precluded from being raised as a triable issue pursuant to s 23(3) of the Act. The court found that the majority judgment of the Court of Appeal failed to consider all the relevant provisions of the Act particularly ss 18 and 23(3) of the same; it was therefore per incuriam the provisions of the Act (see para 12).

[Bahasa Malaysia summary

Responden memasuki perjanjian jual beli dengan syarikat yang dikenali sebagai Yeng Chong Realty Sdn Bhd ('Yeng Chong') di mana responden bersetuju untuk menjual kepada Yeng Chong sekeping tanah yang terletak di Melaka. Walau bagaimanapun, jualan tanah tersebut tidak selesai, oleh itu, responden berhujah bahawa ia tidak boleh dikatakan telah menjual tanah tersebut, ataupun boleh dikatakan bahawa keuntungan boleh dikenakan cukai telah terakru kepada perayu dalam maksud Akta Cukai Keuntungan Harta Tanah 1976 ('Akta'). Responden oleh itu menegaskan yang ia tidak langsung bertanggungjawab untuk membayar apa-apa cukai keuntungan harta tanah ('RPGT') di bawah undang-undang. Dalam kes ini, perayu telah memfailkan prosiding mendapatkan kembali untuk RPGT di Mahkamah Tinggi dan kemudiannya perayu memfailkan permohonan untuk penghakiman ringkas berikutan A 14 Kaedah-Kaedah Mahkamah Tinggi 1980. Mahkamah Tinggi telah membenarkan permohonan tetapi Mahkamah Rayuan dengan keputusan majoriti mengenepikan perintah Mahkamah Tinggi dan menetapkan untuk perbicaraan. Dalam penghakiman majoriti, Mahkamah Rayuan memutuskan bahawa, memandangkan tidak terdapat keuntungan boleh dikenakan cukai, kerana jumlah balasan tidak dibayar, ini membentuk isu yang boleh dibicarakan. Dalam rayuan ini, soalan kebenaran berbangkit adalah: (a) sama ada dalam pendengaran dan memutuskan permohonan untuk penghakiman ringkas di dalam tindakan sivil bagi mendapatkan kembali cukai yang kena dibayar oleh pembayar cukai di bawah s 23(1) Akta, mahkamah

boleh mendengar isu sama ada terdapat keuntungan boleh dikenakan cukai terakru dan/atau jualan aset di antara pembeli dan penjual sebelum penaksiran dibangkitkan terhadap pembayar cukai; (b) sama ada dalam memutuskan tuntutan sivil perayu di bawah s 23(1) Akta, isu terhadap keuntungan boleh dikenakan cukai telah terakru dan/atau jualan aset membangkitkan isu yang boleh dibicarakan; dan (c) yang mana adalah forum yang betul untuk mendengar dan memutuskan berkenaan fakta sama ada terdapat keuntungan boleh dikenakan cukai terakru dan/atau jualan aset di bawah penaksiran yang dibangkitkan oleh perayu.

Diputuskan, mengenepikan penghakiman majoriti Mahkamah Rayuan dan membenarkan rayuan dengan kos:

(1) Berikutan s 21(1) Akta, apabila notis penaksiran diserahkan, cukai yang perlu dibayar akan kena dibayar dan perlu dibayar. Jika responden berasa tidak puas hati dengan isu tidak terdapat keuntungan boleh dikenakan cukai yang berbangkit, responden patut membuat rayuan kepada Pesuruhjaya Khas Cukai Pendapatan berikutan s 18 Akta. Memandangkan tiada rayuan dibuat, isu ini dihalang daripada dibangkitkan sebagai isu boleh dibicarakan berikutan s 23(3) Akta. Mahkamah mendapati bahawa penghakiman majoriti Mahkamah Rayuan gagal untuk mempertimbangkan kesemua peruntukan relevan Akta terutamanya ss 18 dan 23(3) Akta yang sama; ia oleh itu per incuriam peruntukan-peruntukan Akta (lihat perenggan 12).]

Notes

For cases on application for summary judgment, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9868–9950.

For cases on liability for payment of real property gains tax, see 10(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3109–3110.

Cases referred to

Chong Woo Yit v Government of Malaysia [1989] 1 MLJ 473, SC (refd)

Government of Malaysia v Abdul Rahman [1975] 1 MLJ 276 (refd)

Sun Man Tobacco Co Ltd v Government of Malaysia [1973] 2 MLJ 163, FC (refd)

Legislation referred to

Income Tax Act 1967

Real Property Gains Tax Act 1976 ss 14, 15, 17, 18, 21(1), 23, 23(1), (3), 24

Rules of the High Court 1980 O 14

Appeal from: Civil Appeal No B-01(1M)-100 of 2011 (Court of Appeal, Putrajaya)

Mohd Harris bin Hanapi (Ridzuan bin Othman with him) (Legal Counsel, Inland Revenue Board of Malaysia) for the appellant.
Deborah J Kaur (Soraya Jabid Deborah & Co) for the respondent.

Prasad Abraham FCJ (delivering judgment of the court):

[1] This appeal came up for disposal on 20 July 2017. The leave questions before us are as follows:

(a) whether in hearing and deciding the application for summary judgment in a civil action for the recovery of tax due and payable by the taxpayer under s 23(1) of the Real Property Gains Tax Act 1976, the court can entertain the issue of whether there has been a chargeable gain accruing and/or disposal of assets between the buyer and the seller prior to the assessment raised against the taxpayer;

(b) whether in deciding the applicant's civil claim under s 23(1) of the Real Property Gains Tax Act 1976, the issue as to a chargeable gain had accrued and/or disposal of assets raised a triable issue; and

(c) which is the right forum to hear and decide regarding the facts on whether there has been a chargeable gain accruing and/or disposal of assets under the assessment raised by the applicant.

[2] Before proceedings could commence, counsel for the respondent informed the court that he had reached an amicable settlement with the appellant. After some clarification made by the parties the court allowed the appeal, and the order of the Court of Appeal was set aside. We observed that the majority judgment of the Court of Appeal would remain on record, and unless dealt with, would cause confusion to parties and legal advisors alike as it does not reflect the correct position of the law. For the aforesaid reasons, we delivered judgment immediately and indicated to parties that our grounds of judgment will follow subsequently.

[3] Very briefly the facts of the case are as follows.

On 23 April 1997 the respondent entered into a sale and purchase agreement with a company known as Yeng Chong Realty Sdn Bhd ('Yeng Chong') wherein the respondent agreed to sell to Yeng Chong a piece of land located in Melaka ('the said land') for RM31,739,793.62. The respondent asserted that the sale of the said land to Yeng Chong was not completed as Yeng Chong did not fulfil its obligations under the sale and purchase agreement. As such the respondent contended that it could not be said to have 'disposed' of the said land, nor could it be said that a 'chargeable gain' had accrued to the appellant within the meaning of the Real Property Gains Tax ('RPGT') Act. Therefore,

according to the respondent, it was not liable at all to pay any RPGT under the law. The respondent asserted that it had filed two Civil Suit Nos S-22–1468 of 2002 and S-22–448 of 2005 against Yeng Chong in respect of the purchase price payable for the said land, which suits have not yet been concluded.

[4] Before we proceed to deal with the law, the current 'mother ship' of taxing Acts is the Income Tax Act 1967 (Act 53). For specialised areas of transactions, the Legislature enacted similar taxing Acts to govern assessment of tax in these particular fields, one instance of which is the Real Property Gains Tax Act 1976 (Act 169) ('the said Act'). From a perusal of the relevant provisions, provisions relating to assessment of tax, appeals and recovery of tax in the said Act are similar to the Income Tax Act 1967 (Act 53).

[5] In our instant case, ss 14 and 15 of the said Act deal with the raising of notices of assessment by the appellant as set out in s 17 of the said Act. The right to appeal against that assessment is enshrined in s 18 of the said Act and we set out the same:

> 18 Right of appeal
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> (1) A person aggrieved by an assessment made on him may appeal to the Special Commissioners against the assessment in the same manner as an appeal against an assessment of income tax made under the Income Tax Act 1967, and sections 99, 100, 101, 101(1A), 101(1B), 101(1C) and 102 of that Act, as far as they are applicable and with the necessary modifications, shall apply to an appeal against an assessment made under this Act as if —
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> (a) every reference in those sections to income tax or to tax were a reference to real property gains tax; and
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> (b) every reference in those sections to income were a reference to chargeable gains.

[6] On appeal to the Special Commissioners pursuant to s 18 of the said Act, errors or mistakes could be raised, and thereafter under the latter section, when the appeal is finally disposed of, the assessment would be final. In the present case, the respondent had not availed itself of its statutory rights pursuant to this provision.

[7] As the respondent did not avail itself of the appeal process under s 18 of the said Act, the tax then became due and payable, and the appellant was entitled to file recovery proceedings for the tax due, pursuant to s 23 of the said Act. We set out s 23 in toto:

> 23 Recovery by suit
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> (1) Tax due and payable may be recovered by the Government by civil proceedings as a debt due to the Government.

(2) The Director General and all authorized officers shall be deemed to be public officers authorized by the Minister under subsection 25(1) of the Government Proceedings Act 1956 [Act 359], in respect of all proceedings under this section.

(3) In any proceedings under this section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under subsection 21(4).

[8] Having filed the recovery proceedings in the High Court, the appellant then filed an application for summary judgment pursuant to O 14 of the Rules of the High Court 1980. The High Court had allowed the application but the Court of Appeal by a majority decision set aside the High Court order, and set it down for trial.

[9] In the majority judgment of the Court of Appeal, Hamid Sultan Abu Backer JCA, delivery the majority judgment, held that since there was no chargeable gain, as the consideration sum was not paid, that constituted a triable issue. We reproduce paras 14, 15 and 16 of the majority judgment, which read as follows:

[14] In *Matair Suhaili & Anor v Rose Foo Chin Lau & Ors* [2007] 5 CLJ 406 the Court of Appeal on the facts made the following observation:

> under real property gains tax 1976, a real property gains tax is chargeable in accordance with the Act in respect of chargeable gain on the disposal of real property and there is chargeable gain ... chargeable gain is deemed to accrue on the date on which the whole of the value of the consideration was received by the first defendant.

[15] We are surprised to note that the learned counsel for the Revenue Department did not bring to our attention a reported decision of Justice Aziah bt Ali J (as Her Ladyship then was) in the case of *Ketua Pengarah Hasil Dalam Negeri v The Petaling Rubber Estates Limited* [2010] MLJU 1301; where on similar issues the Special Commissioners have inter alia asserted that to be liable to real property gains tax, there must be chargeable gain within the ambit of s 3 of the Act. In that case the Special Commissioners' decision was upheld by the High Court and that will mean it will be wrong for the Revenue Department to raise an assessment when in law and fact the assesse is not liable to RPGT at the material time.

[16] We do not think it is necessary to go into further adumbration on the respondents right to summary judgment at this stage, as it is very clear from the instant case the appellant has raised triable issues which ought to be ventilated at a full trial taking into account that the Act will not apply to all persons and the sine qua non for the Revenue Department to trigger the Act must relate to a disposal as envisaged by the Act. It must not be forgotten that where the language of the Act is clear and explicit the court is duty bound to give effect to it. We must make it clear in the instant case the duty of the trial court is to ascertain whether there was in fact a disposal as envisaged by the Act. If the court comes to a finding in favour of the Revenue Department then the liability and/or quantum arising from the assessment

cannot be a subject matter of dispute in the court exercising its original jurisdiction and that jurisdiction in the first instance is vested only with the Special Commissioners.

[10] Before giving our legal views, we discuss first the cases on this area of the laws and propositions emanating from them, with the locus classicus being the case of *Sun Man Tobacco Co Ltd v Government of Malaysia* [1973] 2 MLJ 163, a decision of this court where the Government of Malaysia was given liberty to enter final judgment. We refer to the judgment of Gill FJ and we quote from p 164 right hand column para I to para C, at p 165 which reads:

> I agree with the learned Lord President that this appeal should be dismissed with costs. There is a string of decided cases (*ABC v The Comptroller of Income Tax, Singapore* [1959] MLJ 162 at p 166; *Comptroller of Income Tax v RST* [1962] MLJ 216; *Comptroller of Income Tax v A Co Ltd* [1966] 2 MLJ 282 at p 284; *Comptroller of Income Tax v AB* and *Comptroller of Income Tax v CD Ltd* [1967] 1 MLJ 11; *Comptroller-General of Inland Revenue, Malaysia v Weng Lok Mining Co Ltd* [1969] 2 MLJ 98; *Government of Malaysia v DC* [1973] 1 MLJ 161 and *Comptroller-General of Inland Revenue v NP* [1973] 1 MLJ 165) in which *it has been held that the effect of the relevant provisions of the Income Tax Act 1967 is that on the service of a notice of assessment on the person assessed the tax payable under the assessment becomes due and payable at the place specified in the notice, whether or not the person appeals against the assessment, and can then be recovered by the government by civil proceedings as a debt due to the government. On such civil proceedings being brought by the government, the court has no power to entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased*. (Emphasis added.)

[11] We refer also to *Government of Malaysia v Abdul Rahman* [1975] 1 MLJ 276, a decision of the High Court and to the judgment of Arulnandom J (as he then was), which was approved in the Supreme Court decision of *Chong Woo Yit v Government of Malaysia* [1989] 1 MLJ 473, which we now quote and agree with:

> In this case after the notices of assessment were served and the tax was not paid the government instituted proceedings for the whole tax payable. The court under s 106(3) cannot entertain any plea that the tax or additional tax was not correctly assessed. In the case of *ABC v The Comptroller of Income Tax, Singapore* it was held that notices of assessment for several years were valid. Regarding the question whether triable issues or objections to the tax entitled the defendant to leave to defend I only need to refer to the recent Federal Court decision in *Sun Man Tobacco Co Ltd v Government of Malaysia* where it was held that the court was right in giving leave to the government to sign final judgment and in holding that if the taxpayer wished to dispute that the amount of tax sought to be recovered was excessive, incorrectly assessed, under appeal or incorrectly increased, he had to do so by way of appeal to the Special Commissioners.

It was obvious that the majority judgment of the Court of Appeal failed to consider any of those cases nor afforded an explanation, despite the strong pronouncement of law in these cases, why it felt that the issue of no chargeable gain constituted a triable issue in the context of the said Act.

[12] We hold that pursuant to s 21(1) of the said Act, once a notice of assessment has been served, the tax payable will be due and payable. If the respondent felt aggrieved by the issue of no chargeable gain arising, the respondent should have lodged an appeal to the Special Commissioners of Income Tax pursuant to s 18 of the said Act. Since no appeal was lodged, this issue was precluded from being raised as a triable issue pursuant to s 23(3) of the said Act. We find that the majority judgment of the Court of Appeal failed to consider all the relevant provisions of the said Act particularly s 18 and s 23(3) of the same; it is therefore per incuriam the provisions of the said Act.

[13] For the aforesaid reasons we find the majority judgment of the Court of Appeal as being in error, in light of the relevant provisions of the said Act, and therefore prefer the views expressed in the dissenting judgment of the Court of Appeal.

[14] In the upshot:

(a) if a notice of assessment is raised, and if a tax payer wishes to raise issues pertaining to the amount, the correctness or the legality of the assessment raised, the tax payer should invoke s 18 of the said Act. If this is resolved in the tax payer's favour then whatever tax paid can be refunded as an over payment pursuant to s 24 of the said Act; and

(b) if the tax payer fails to do so, then these issues cannot be raised as triable issues in an application for summary judgment by virtue of s 23(3) of the said Act.

[15] We therefore order the majority judgment of the Court of Appeal be set aside albeit by consent. On the premise of this appeal being allowed by consent, we answer the leave question posed as follows:

(a) question (a) — no;

(b) question (b) — no; and

(c) with regards to question (c) the proper forum to hear the said issue would be the Special Commissioners of Income Tax pursuant to s 18 the said Act.

[16] We therefore allow the appeal with costs.

Majority judgment of Court of Appeal set aside; appeal allowed with costs.

Reported by Dzulqarnain Ab Fatar